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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION**

MEGAFON PJSC, a Russian corporation

 Plaintiff,

 v.

 HEWLETT PACKARD ENTERPRISE
 COMPANY, a Delaware corporation,

 Defendant.

Case No. 5:18-cv-06463-NC

**JOINT STATUS REPORT FURTHER TO
 NOVEMBER 27, 2019 DISCOVERY HEARING**

1 Plaintiff MegaFon PJSC (“Plaintiff” or “MegaFon”) and Defendant Hewlett Packard
2 Enterprise, Company (“Defendant” or “HPE”) (collectively, the “Parties”) submit this Joint Status
3 Report pursuant to the Court’s request at the November 27, 2019 discovery hearing.

4 **1. Protective Order**

5 The Parties have been unable to resolve their dispute regarding the Protective Order, as
6 articulated in the letter briefs recently filed. *See* Dkts. 82, 84. The Parties’ positions are summarized
7 below:

8 **A. MegaFon’s Position**

9 Since the November 27, 2019 hearing, HPE provided MegaFon with five example documents
10 of what HPE believes require an amendment to the protective order entered by this court. The parties
11 met and conferred regarding those five example documents. Neither HPE’s examples nor the meet
12 and confer revealed any information distinguishing this dispute from the one resolved in August.
13 HPE’s arguments about the competitive sensitivity are still overstated, as the financial information is
14 old and any business strategy or technical information revealed is high level or overview. And while
15 HPE has still not provided MegaFon with the exact number of documents withheld, MegaFon now
16 believes HPE is either currently withholding or plans to withhold thousands of documents, based on
17 HPE representation that they want approximately 20 percent of their intended productions to have an
18 Outside Counsel Only designation (HPE has produced approximately 13,000 documents to date for
19 only the first set of custodians). This only further indicates that HPE is over-designating documents
20 for confidentiality and that no extraordinary protection is warranted.

21 As already articulated to the Court, HPE is withholding an unidentified number of
22 “competitively sensitive” responsive documents, despite the robust two-tier Protective Order already
23 on file in this action. Between first learning of the withheld documents and the date of this filing,
24 MegaFon has provided HPE with numerous opportunities to distinguish the withheld documents from
25 HPE’s request in August, and HPE provided none. In August, this Court reviewed the same requests
26 for production (*see* Dkt. 71-2, MegaFon’s First Set of RFPs) and determined that the two tiers of
27 protection in the Northern District’s model protective order, “Confidential” and “Highly
28 Confidential,” were appropriate. That order protects as “Highly Confidential” documents with

1 “extremely sensitive” information, “disclosure of which . . . would create a substantial risk of serious
2 harm that could not be avoided by less restrictive means.” Dkt. 79, at § 2.9. This is consistent with
3 this Circuit’s “strong presumption in favor of access.” *San Jose Mercury News, Inc. v. United States*
4 *Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

5 HPE has argued that the withheld documents need extraordinary protection because they
6 contain sensitive financial information, competitively sensitive information, and technical information
7 that warrants an “Outside Counsel Only” designation. But HPE has not met its burden for such
8 extraordinary protection. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir.
9 2003) (the party seeking protection bears the burden of showing that protection is warranted). After
10 the November 27, 2019 hearing, HPE provided MegaFon with five documents it deemed illustrative
11 examples of withheld documents that contain competitively sensitive information. However, those
12 sample documents, by HPE’s own admission, contain mere overviews of other customers’ system
13 structures and do not contain the highly competitive sensitive information about which Defendant now
14 complains. Moreover, the financial figures included the documents are not current, generally dating
15 back to 2016 and 2017, and they are not detailed enough to warrant extraordinary protection. Further,
16 MegaFon is not a competitor of HPE and HPE has not articulated any competitive advantage MegaFon
17 stands to gain. HPE’s speculation requires assuming that MegaFon’s designated technical specialists
18 will knowingly violate the Protective Order to share HPE’s information with an HPE competitor who
19 might in some way use this dated information to its advantage. This comes far from meeting HPE’s
20 burden to justify further restrictions on MegaFon’s access to discoverable information.

21 Despite MegaFon’s good faith effort to consider HPE’s position regarding the withheld
22 documents, MegaFon disagrees that the documents require any special protection beyond what is
23 already provided in the Protective Order. The Protective Order entered by this Court after the August
24 hearing was based on the same arguments HPE raises here, and that Protective Order should remain
25 in place. The Protective Order is intended to protect “trade secrets, confidential, proprietary, or private
26 information for which special protection from public disclosure and from use for any purpose other
27 than prosecuting this litigation may be warranted.” Dkt. 79, Protective Order 1:2-4 (emphasis added).
28 HPE has not met its burden to show that the protections this District recommends and this Court

1 ordered are insufficient. HPE should be ordered to produce these responsive documents with
2 appropriate designations immediately.

3 B. HPE's Position

4 MegaFon unilaterally filed a discovery brief on this issue on November 22, Dkt. 82, without
5 first meeting and conferring with HPE. HPE filed its brief on November 25, Dkt. 84, and during the
6 conference that occurred at the November 27 discovery hearing, HPE shared a proposed revision to
7 the Protective Order with MegaFon in the hopes of resolving this dispute. After that conference and
8 HPE's explanation of what it proposed, the Court ordered the Parties continue to negotiate; to aid that
9 discussion, HPE offered to provide MegaFon outside counsel with examples of the type of documents
10 over which HPE seeks additional protection. Nov. 27, 2019 Transcript 4:6-11, 6:4-22.

11 HPE provided five exemplar documents to MegaFon outside counsel on December 3. Those
12 documents contain references to the UDR project, but the majority of their content concerns
13 information that is by any objective measure a trade secret and/or sensitive commercial information—
14 such as information concerning financial margins and financial forecasting for unrelated projects for
15 HPE customers (nonparties to this litigation); internal analysis of HPE's competitive advantage on
16 recent projects unrelated to this litigation (non-UDR and non-MegaFon); technical details of HPE
17 customers' systems architecture for unrelated projects; the total contract value and other financial data
18 for unrelated deals signed between HPE and third parties; and internal business strategy outlines,
19 including profit margins, among other things.¹ HPE did not "admit" that these documents contain
20 only an overview of this sensitive information—to the contrary, during the meet-and-confer, HPE
21 explained why this detailed information is so sensitive.

22 At the Parties' December 5 meet-and-confer, MegaFon refused to consider HPE's proposed
23 changes to the Protective Order and expressed no interest in proposing any alternative language.
24 Rather, after reviewing the five exemplars HPE provided, MegaFon maintains that HPE's financial
25 forecasting data, financial details and profit margins for HPE's contracts with third parties, and the
26

27 ¹ HPE requests permission to (1) submit to the Court its proposed modifications to the Protective Order
28 and (2) provide the Court for *in camera* review the exemplar competitively sensitive documents shown
to MegaFon outside counsel earlier this week.

1 technical details of other HPE customers' systems are neither competitively sensitive nor trade secrets.
2 During the meet-and-confer, counsel for MegaFon provided no explanation why the above-described
3 information is not deserving of additional protection beyond stating that it may not be current and that
4 the UDR project has ended.

5 MegaFon is wrong. This information plainly constitutes trade secret and competitively
6 sensitive material. 18 U.S.C. § 1839(3) ("trade secret" includes "all forms and types of financial,
7 business, scientific, technical, economic, or engineering information, including . . . plans,
8 compilations, . . . designs, . . . methods, techniques, processes, [or] procedures"); *In re Elec. Arts, Inc.*,
9 298 F. App'x 568, 569-70 (9th Cir. 2008) (finding "pricing terms, royalty rates, and guaranteed
10 minimum payment terms" "plainly fall[] within the definition of 'trade secrets,'" holding district court
11 abused its discretion in denying motion to seal, and granting mandamus petition); *see also United*
12 *States v. Chung*, 659 F.3d 815, 827 (9th Cir. 2011). Even the cases that MegaFon cites recognize that
13 "trade secrets" and "financial information" meet the burden for protection under Rule 26(c). *Foltz*,
14 331 F.3d at 1131 & n.4.

15 Disclosure of this information to MegaFon employees, who are currently working with HPE's
16 competitor to implement competing technology, could cause substantial harm to both HPE and
17 nonparty HPE customers, many of whom are MegaFon competitors. MegaFon's argument to the
18 contrary—that the information is outdated because the UDR system at issue in this case reached end-
19 of-life—is unavailing. The sensitive material in these documents is about other systems owned by
20 other HPE customers, some of whom are MegaFon's direct competitors. That information does not
21 lose its status as commercially sensitive or trade secret simply because HPE's contractual relationship
22 with MegaFon has ended. Moreover, this information does not relate to outdated, legacy systems—it
23 is far more recent than that and pertains to currently deployed third-party systems. The UDR system
24 that is the subject of this litigation spanned, from contract execution through the project end of life,
25 spring 2013 until the summer of 2019, and even MegaFon would not likely dispute that the financial
26 and technical details of that system were commercially sensitive during that time frame. It is thus
27 disingenuous for MegaFon to suggest that similar categories of information for other HPE customers
28 dating back for a far shorter time are somehow not competitively sensitive, as it baldly declares.

As this Court suggested in August, HPE now seeks to add a tier of information to the Protective Order that would prohibit MegaFon in-house technicians from reviewing these documents. Aug. 28, 2019 Teleconference Tr. 18:22-19:10. HPE's proposal would bring the Protective Order in line with this Court's Model Order. Contrary to MegaFon's assertion, the existing Protective Order is weaker than the Model Order, because the Protective Order allows MegaFon in-house technical specialists to review "Highly Confidential" material. *Compare* Model Stipulated Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information, and/or Trade Secrets ¶¶ 2.7, 2.8, 7.3 (restricting "Attorneys' Eyes Only" information to an Expert who "is not a past or current employee of a Party or of a Party's competitor") *with* Dkt. 79 at ¶¶ 2.5, 7.2(c). And MegaFon is simply wrong in suggesting that this issue was already decided by the Court—to the contrary, the Court made clear that if MegaFon sought sensitive commercial information (which in late August it represented it was not doing, Aug. 28, 2019 Teleconference Tr. at 20:16) that the parties could confer and return to the Court to seek added protections as appropriate.² *Id.* at 19:6-9.

It is "unreasonable to expect that anyone working to further his own scientific and technological interests would be able assuredly to avoid even the subconscious use of the confidential information." *TVIIM, LLC v. McAfee, Inc.*, 2014 WL 2768641 at *2 (N.D. Cal. June 18, 2014). Importantly, if MegaFon in-house technical experts in Russia violate the terms of the existing Protective Order, HPE and the third parties whose information is contained in these documents would be without recourse; MegaFon's in-house employees reside in Russia and are beyond the reach of this Court.

MegaFon's continued intransigence on this issue and demand that its in-house employees be allowed to see competitively sensitive material raises concerns about MegaFon's motives in seeking these documents. Those concerns were only heightened when MegaFon's counsel was unable to articulate a single reason that in-house technical personnel would have a legitimate need to review HPE's financial information, competitive analyses, planning documents, or customer information that

² While MegaFon notes that the existing Protective Order guards against the public disclosure of trade secrets and commercially sensitive information, it does not protect against the disclosure of such information to MegaFon's in-house personnel, which is why the requested protections are indeed necessary.

1 was shared. *See La. Pac. Corp. v. Money Market 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 490-91
2 (N.D. Cal. 2012) (upholding attorneys’-eyes-only confidentiality designation for “internal accounting
3 deliberations; account statements and other documents showing [the plaintiff’s] financial picture and
4 investment strategy” because, in part, the defendant failed to explain in detail why its in-house business
5 employees needed access to the documents).

6 Despite MegaFon’s inability to explain why its in-house employees—as opposed to an outside
7 expert, consistent with the Model Protective Order—need to review these documents, HPE has
8 repeatedly offered that if MegaFon’s outside counsel determines that individual documents need to be
9 reviewed by MegaFon in-house technical specialists, HPE would be willing to discuss redacting
10 documents on a document-by-document basis. HPE’s proposed Protective Order also retains language
11 from the existing order to allow Parties to challenge the confidentiality designations of individual
12 documents. MegaFon rejected this compromise as well, though it failed to explain why this system
13 would be insufficient for the purposes of this litigation.

14 2. ADR

15 The Parties are open to mediation in the upcoming months and are currently discussing the
16 selection of an appropriate mediator.

17 3. Special Discovery Master

18 A. MegaFon’s Position

19 MegaFon does not believe that a special discovery master is necessary at this time. MegaFon
20 does not believe that the Parties are at an impasse with respect to the discovery disputes HPE highlights
21 below, and MegaFon believes that the Parties will be able to resolve these disputes without judicial
22 intervention.

23 B. HPE’s Position

24 HPE believes the appointment of a Special Master is desirable and appropriate in light of the
25 Court’s comments about its busy docket at the November 27 hearing, particularly if the Parties hope
26 to adhere to the existing schedule in this case. HPE anticipates a number of discovery disputes will
27 arise in the coming weeks: on the protective order referenced above, the issue of HPE apex custodians
28 referenced below, as well as on MegaFon’s deficient interrogatory responses, deficient Rule 26(a)

1 damage disclosures, and the status of its document production. Although the Parties met and conferred
 2 on all these issues (with the exception of apex custodians), they remain at an impasse, and so it seems
 3 clear that judicial intervention will be necessary. Moreover, MegaFon has unilaterally filed two letter
 4 briefs on discovery disputes, in violation of the Court's Standing Order. HPE therefore has every
 5 reason to suspect discovery in this case will remain contentious, and the involvement of a Special
 6 Master would promote the efficient resolution of disputes while preserving judicial resources. Indeed,
 7 MegaFon argues, inconsistently, that a discovery master is not needed even as it claims (inaccurately)
 8 that the resolution of the custodian dispute, described below, has stalled.³ This dispute illustrates why
 9 a Special Master would be prudent.

10 HPE requests that the Parties be directed to confer and identify an appropriate Special Master.
 11 If the parties are unable to agree on an appropriate candidate by December 18, HPE asks that the
 12 Parties submit their respective candidates to the Court by that date.

13 **4. HPE Custodians**

14 **A. MegaFon's Position**

15 Pursuant to the Court's instruction, MegaFon identifies the following four witnesses to be
 16 added to HPE's custodian list: (1) Ivan Petrov; (2) Oleg Neyolov; (3) Ken Marchant; and
 17 (4) Konstantin Pavlov.

18 In addition, pursuant to the Court's suggestion that MegaFon propose a narrowed scope for
 19 production of Ms. Whitman's and Mr. Neri's documents (*see* 11/27/2019 Hg. Tr. 21:11-24), MegaFon
 20 proposes the following, which should inform HPE's collection of the relevant documents, reduce
 21 burden, and provide MegaFon with the documents it seeks. As the meet and confer process regarding
 22 HPE's custodian list has continued for months and repeatedly stalled, MegaFon requests that the Court
 23 enter an order with the below scope for Ms. Whitman and Mr. Neri:

- 24 • Documents or correspondence used to inform, prepare, or brief Meg Whitman and/or Antonio
 25 Neri on the UDR system failures in April, May, and June 2017, as referenced in this litigation,

26
 27 ³ HPE notes that the Court only directed the parties to confer about the scope of the apex custodian
 28 documents on November 27; that discussion has not continued for months as MegaFon incorrectly
 claims.

1 including, but not limited to, any notes, minutes, agendas, presentations, emails, reports, or any
2 other written or electronic communications.

- 3 • Documents or correspondence used to inform, prepare, or brief Meg Whitman relating to her
4 May 22, 2017 email to MegaFon employees regarding the UDR system failures, and any other
5 2017 emails or calls between Ms. Whitman and MegaFon's Sergey Soldatenkov or other
6 MegaFon employees, including, but not limited to, any notes, minutes, agendas, presentations,
7 emails, reports, or any other written or electronic communications.
- 8 • Documents or correspondence used to inform, prepare, or brief Antonio Neri relating to the
9 May 20, 2017 call between Mr. Neri and MegaFon employees, the June 2017 emails between
10 Mr. Neri and MegaFon employees following the June 14, 2017 UDR system blackout, and any
11 other 2017 emails, letters, or calls between Mr. Neri and MegaFon employees, including, but
12 not limited to, any notes, minutes, agendas, presentations, emails, reports, or any other written
13 or electronic communications.

14 B. HPE's Position

15 Despite the Court's instruction to meet and confer on these issues before submitting a joint
16 statement, MegaFon was unprepared to discuss additional HPE custodians on December 5 (it did not
17 identify the scope of apex custodian documentation it sought nor identify the non-HPE custodians it
18 sought). Rather, MegaFon provided this proposal for HPE's review only when it sent this draft status
19 report this morning. Accordingly, while it appears MegaFon's proposal on document requests from
20 Antonio Neri and Meg Whitman is overly broad given the Court's instruction to narrow the requests
21 to a "particular event" and "date," Nov. 27, 2019 Transcript 21:15-16, HPE needs time to confer with
22 its client on an appropriate response. MegaFon again seeks to circumvent the meet-and-confer
23 process, as it now asks the Court to enter an order defining the scope for the production of apex
24 custodian documents *even though* MegaFon first provided its proposal earlier today in the form of this
25 draft Joint Statement and made no effort whatsoever to discuss it with HPE beforehand, as the Court
26 directed. MegaFon's attempt to sidestep the meet-and-confer process should be denied; indeed,
27 MegaFon's tactics have afforded HPE's counsel with no opportunity to confer with their client on this
28 important issue.

1 HPE acknowledges receipt of MegaFon's request to add Ivan Petrov, Oleg Neyolov, Ken
2 Marchant, and Konstantin Pavlov as custodians, and will begin to collect their documents.
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1 Dated: December 6, 2019

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